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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

The Hon. Roslynn R. Mauskopf
Director
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

March 15, 2021

Dear Judge Mauskopf:

Congratulations on your appointment as Director of the Administrative Office of the U.S. Courts. I look forward to working with you.

I'm writing to ask about the ethics requirements of federal judges who have been nominated to executive-branch positions that require Senate confirmation. As you know former-Judge Merrick Garland of the D.C. Circuit was last week confirmed by the Senate and appointed by the President to be Attorney General of the United States. While Attorney General Garland received bipartisan support, there was a lot of concern among my colleagues that he didn't answer many questions involving how the Justice Department under his leadership will approach important litigation issues. He wouldn't do so because of guidance he apparently received from the Administrative Office about his obligations under the Code of Conduct for Federal Judges.

I asked Judge Garland twice how he expected to answer our questions as a sitting judge. In our initial phone call I noted that Canons 3, 4, and 5 each seem to preclude him from giving the sort of testimony we would normally expect from a Justice Department nominee. I suspected that he had received some sort of ethics guidance already because his appearance alongside President Biden in a purely political transition event seemed to be in clear tension with Canons 4 and 5—absent some guidance to the contrary. Judge Garland told me that he had indeed sought guidance and that he was able to discuss policy matters but not pending or impending litigation. While he didn't put it like this, I took this to mean that standard policy testimony was fine under Canons 4 and 5 but he was still bound by Canon 3A(6). He said he'd seek further guidance, though, so I followed up at his hearing and he reiterated what he had told me on the phone.

As a result Judge Garland was willing to tell us at his hearing that he would follow President Biden's policy lead generally but not how he planned to approach specific cases as Attorney General. So, for example, he was willing to say that he, like President Biden, now opposes the death penalty, but he would not say one way or the other whether this meant he would cease to defend Dylann Roof's death sentence on direct appeal.

This is a puzzling and unsatisfying line to draw. When a sitting judge tells us his views on matters of public policy—say on the death penalty or mandatory minimums or global warming—I don’t see how it squares with the Canons. I think a sitting judge providing Senate testimony as an executive branch nominee on political matters like public policy is an extrajudicial activity that “reflect[s] adversely on the judge’s impartiality” (Canon 4) and constitutes “other political activity” (Canon 5) just as much as giving views on pending or impending litigation runs afoul of Canon 3A(6).

Let’s say Judge Garland had not been confirmed, would he have been fit to hear the appeals of January 6th rioters whom he denounced in no uncertain terms on national television? I doubt it. He’d probably need to recuse himself from their appeals. But at least the Senate was able to hear his opinion on those riots in order to help us give our advice and consent. We had no such luck on cases that he categorized as “pending litigation.”

I think the policy-case distinction doesn’t work. Judges giving the public at large their views on cases and giving the public at large their views on public policy are both inconsistent with the Canons. If federal judges are nominated for political positions requiring Senate confirmation, then they should probably resign upon nomination. If they don’t resign, then they should answer *all* of the Senate’s questions without hiding behind the Code of Conduct. This isn’t like a judicial nomination where the Code applies because there’s a lifetime expectation of impartiality ahead of the nominee. I understand that the Code does apply to sitting judges nominated to executive-branch positions because they’re still judges and in the unfortunate event the confirmations fail, they will go back to being judges with that same expectation of impartiality. But in that case former nominees have the same remedy for statements they made about pending litigation as they have for statements about public policy: recusal on a case-by-case basis. I don’t see why it’s any better for a nominee to go back to being a judge and hearing death penalty appeals after loudly denouncing its morality and its mechanics than it is for her to do so after having said whether or not she would defend a particular sentence on appeal.

Those are my thoughts on the matter. These are my questions for you:

First, can you provide me with whatever ethics guidance you gave Judge Garland so that we can better understand the particular lines that the Administrative Office is drawing here?

Second, do you think that same distinction between pending and impending cases and public policy applies to judicial nominees? It’s the same Code, so I’m not sure how it wouldn’t.

Third, do you agree with me that sitting judges who are nominated to executive-branch service should probably resign upon nomination in order to maintain the political independence of the judiciary? If not, I’d be interested to hear why.

And *fourth*, do you agree with me that any sitting judge who doesn’t resign, should probably answer *all* questions and just deal with possible recusal issues later? Because even under the Garland standard she’d have to face recusal motions anyway for her policy views.

I supported Attorney General Garland. I voted for him and I hope he does a good job. But I worry that the precedent he set will incentivize administrations from both parties to nominate judges who can avoid answering the hard questions because of their status as judges. I think that’ll be bad for

the judiciary and bad for the Senate. So I'd respectfully urge you to put some thought into this before it happens again.

Congratulations again.

Sincerely,


Chuck Grassley
Ranking Member
Judiciary Committee